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IN THE

Supreme Court of the United States

Term, No. 149-150

CLAIR CONRAD,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PASQUALE DAMIANO,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Clair Conrad and Pasquale Damiano, by their attorneys, pray that writs of certiorari issue to review the judgments

of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cases on April 30, 1947.

OPINIONS BELOW.

The opinions of the U. S. District Court for the Eastern District of Pennsylvania and of the U. S. Circuit Court of Appeals for the Third Circuit have not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on April 30, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A. Section 347 (a).

QUESTIONS PRESENTED.

1. Where an injured employee of an interstate railroad, without benefit of legal counsel, entered into a Pennsylvania Workmen's Compensation agreement prepared by the railroad, approved by the Compensation Board, and under which defendant railroad made payments, and where the employee was induced to enter into such agreement by the importuning of defendant and by its assurances that he had no other remedy, but discovered over three years after his injury, but within one year of the last compensation payment, that he had been entitled to relief under the Federal Employers' Liability Act, did not the Workmen's Compensation proceedings constitute commencement of an action within the meaning of Section 6 of the Federal Employers' Liability Act (45 U.S.C.A. 56)?

(*Answer below: No.*)

2. Under the recited circumstances, did not resort, by defendant railroad, to the agreement, with the purpose and effect of procuring the operation of the statute of limitations, so contravene Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. 55) as to prevent defendant from invoking the statute of limitations?

(*Answer below: No.*)

STATUTES INVOLVED.

Sec. 6 of the Federal Employers' Liability Act (45 U.S.C.A. 56) provides:

> "No action shall be maintained under this Chapter unless commenced within three years from the day the cause of action accrued."

Sec. 5 of the Federal Employers' Liability Act (45 U.S.C.A. 55) provides in part:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void * * *"

STATEMENT OF FACTS.

The sole issue raised by these two companion cases, brought under the Federal Employers' Liability Act, is whether they are barred by the three-year statute of limitations (Sec. 6 of the Federal Employers' Liability Act, 45 U.S.C.A. 56). Conrad was injured in Pennsylvania, on October 12, 1941, while in the employ of the Pennsylvania Railroad Company, and suit was started on his behalf in the U. S. District Court for the Eastern District of Pennsylvania on June 12, 1946. Damiano was injured also while in the employ of the same railroad, on November 4, 1942, and his suit was started in the same Court on May 16, 1946. Both actions were dismissed by that Court on Defendant's motion, on the ground that they were barred by the statute of limitations.

Because both cases raised essentially the same issues, the District Court considered them together, and by stipulation of counsel, appeals to the Circuit Court of Appeals (Third Circuit) were consolidated.

In both cases, workmen's compensation proceedings were instituted shortly after the accident by the filing of workmen's compensation agreements with the Pennsylvania Workmen's Compensation Board. Although the agreements themselves or copies thereof were not before the District or Circuit Courts (having been omitted by plaintiffs from the pleadings because regarded by them as evidentiary), it may be gathered from an affidavit and a sworn statement, filed by Conrad and Damiano, respectively, and made part of the record, that the agreements were under the Pennsylvania Workmen's Compensation Act (June 21, 1939, P. L. 520, Secs. 1, et seq.). The motions to dismiss were heard on that theory by the District Court, as apparently was the appeal before the Circuit Court (see page 2 of Opinion of Circuit Court).

In the *Conrad* case, shortly after the accident, at the defendant's suggestion, in the absence of legal counsel to represent the plaintiff, and while plaintiff was in the hospital, plaintiff entered into a workmen's compensation agreement with the defendant (Conrad, R. 5. 6). Under Pennsylvania law all compensation agreements must be submitted to the Workmen's Compensation Board for approval (Act of 1915, June 2, P. L. 736, Sec. 409, as amended; 77 P. S. 733). Conrad entered into these proceedings before the Board in reliance upon defendant's implicit representation that the matter fell exclusively within State law (Conrad, R. 6). Later, defendant filed a petition with the Board to terminate compensation payments, but the hearing "was called off" (Conrad, R. 6).

In the *Damiano* case, shortly after plaintiff returned home from the hospital, and while he was still incapacitated, defendant's claim agent visited him and, in the absence of any legal counsel to represent Damiano, induced him to sign a

workmen's compensation agreement, despite protests by Damiano, by assuring him that "you are not signing anything bad; we have to send that in to Harrisburg and approve your compensation". (Damiano, R. 7, 8.) In Paragraph 13 of the Complaint, Damiano alleged, in effect, that he had been induced to enter into the agreement by the Defendant "either fraudulently or by mutual mistake of fact", on the premise that the State law was exclusively applicable.

Neither in the Conrad nor Damiano case did defendant tell or even intimate to plaintiff that he had any rights under the Federal Employers' Liability Act; on the contrary, both men were told that their only remedy was for compensation (Conrad, R. 6; Damiano, R. 8). In both cases, compensation payments were made to plaintiff within less than a year from the commencement of the Federal action, which each instituted promptly upon discovery of the applicability of Federal law. (Conrad, R. 6, Damiano, R. 8.)

In both cases, because three years had passed from the time of the injury until the starting of the Federal action, defendant moved to dismiss the action on the ground that it was barred by the statute of limitations. There appears to be no Pennsylvania statute or decision creating or regulating the right to transfer proceedings from the Workmen's Compensation Board to any other Court.

The lower Court granted the motions to dismiss. Conrad and Damiano each petition for certiorari, following affirmance by the U. S. Circuit Court of Appeals (Third Circuit) of the action of the District Court dismissing each action.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in the following respects:

(1) In holding that the institution of Workmen's Compensation proceedings do not constitute "commencement" of an action within the meaning of Section 6 of the Federal Employers' Liability Act;

(2) In holding that the defendant railroad may invoke the statute of limitations notwithstanding petitioners' contention that they were lulled into inaction by the Workmen's Compensation agreement, procured by the railroad in violation of Section 5 of the Federal Employers' Liability Act;

(3) In failing to reverse the order of the District Court dismissing petitioners' complaints with prejudice.

REASON URGED FOR GRANTING OF WRIT.

(1) The decision of the U. S. Circuit Court of Appeals (Third Circuit) is inconsistent in principle with New York Central & Hudson Railroad Co. vs. Kinney, 260 U. S. 340 (1922).

(2) This appeal raises the question left open for future decision in Herb vs. Pitcairn, 325 U. S. 77, 79 (1945), as to whether an action would be barred by the statute of limita-

tions if State law made new or supplemental process necessary.

(3) This appeal raises for the first time in this Court the novel and important question whether the statute of limitations in Federal Employers' Liability cases is to be read with and be limited by Section 5 of the Act so as to permit tolling of the statute of limitations where the delay in suing results from an agreement fraudulently induced by defendant.

(4) Since no Pennsylvania statute or decision permits transfer of proceedings from the Workmen's Compensation Board to another Court having jurisdiction over Federal Employers' Liability claims, the decision below deprives railroad employees who are litigants in Pennsylvania of the benefits and protection of N. Y. Central & Hudson Railroad vs. Kinney, 260 U. S. 340 (1922), and Herb vs. Pitcairn, 325 U. S. 77 (1945), which are enjoyed by similar litigants in other States which authorize transfer of proceedings to tribunals having jurisdiction over Federal Employers' Liability claims.

BRIEF.

ARGUMENT.

I.

The initiation of workmen's compensation proceedings and defendant's payments thereunder tolled the statute of limitations.

It is not necessary, in order to "commence" an action and to toll the statute of limitations under the Federal Employers' Liability Act, that proceedings be instituted initially in a Federal court, or even that the proceedings purport to be brought under the Federal Employers' Liability Act. It is sufficient that proceedings *in any tribunal* be instituted to recover for the particular injury, albeit the proceedings be maintained under plaintiff's mistaken belief that State law is exclusively applicable.

Many Federal cases hold that even though a plaintiff mistakenly brings proceedings in a Federal court *under state law and without any reference to the Federal Employers' Liability Act or interstate commerce,* plaintiff may later—even after the statutory period from the time of the accident has elapsed—amend his complaint and proceed under the Federal Employers' Liability Act, notwithstanding Section 6 thereof.[1] Even when proceedings based exclusively

[1] MISSOURI, K. & T. R. CO. v. WULF, 226 U. S. 570, 33 S. Ct. 135 (1912); SEABOARD AIR LINE RY. v. RENN, 241 U.S. 290, 36 S. Ct., 567 (1915); SMITH v. ATL. COASTLINE RY. CO., 210 F. 761 (C.C.A. 4, 1913). In these cases, actions were instituted in a Federal District Court solely on the grounds of diversity of citizenship, and the right of action was based exclusively on state law. Amendments to the complaint were allowed after the statutory period in each case, and plaintiff was allowed to proceed under the Federal Employers' Liability Act.

on state law were started in a *state court*, it has been held that plaintiff may, even after the statutory period under the Federal Employers' Liability Act has run, abandon his action under state law and proceed under Federal law.[2]

In N. Y. CENTRAL & HUDSON R. R. CO. v. KINNEY, 260 U. S. 340 (1922), an action was brought *under state law in a state court*. It was not until after three trials and seven-and-one half years from the time action had been brought that the complaint was amended to state a cause of action under the Federal Employers' Liability Act. The Court held that Section 6 was not a bar, stating (at page 346):

> "Of course, an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."

Under the decisions of this Court, it is settled that the theory of the original suit may be changed even after the running of the statute of limitations. Thus, in TILLER v. ATL. COAST LINE R. CO.,[3] in an action originally based exclusively on the Federal Employers' Liability Act, and therefore resting on proof of negligence, an amendment was permitted after the limitation period had expired, alleging violation of the Boiler Inspection Act, involving absolute liability.

In the instant case, not only were proceedings on the *agreement* started before a state tribunal (the Workmen's

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[2] ILL. CENTRAL RY. CO. v. VAMS, 140 La. 1, 72 So. 788 (1917), affirmed per curiam, 246 U.S. 652, 38 S. Ct. 344; KINNEY v. N. Y. CENTRAL & H.R.R. CO., 162 N.Y. Sup. 42, 98 Misc. Rep. 11 (1916), affirmed in 164 N.Y.S. 1098; BROOM v. SOUTHERN RY. IN MISS., 115 Miss. 493, 76 S. 525 (1917); CURTICE v. CHICAGO & N.W. R.R. CO., 162 Wis. 421, 156 N.W. 484 (1916). For many other similar cases see the authorities cited at page 425 of the CURTICE case, supra.

[3] 323 U.S. 574, 65 S. Ct. 421 (1945).

Compensation Board), but *payments* were actually made in both cases by the defendant in recognition of its liability, pursuant to agreements filed before that tribunal.[4] Furthermore, it is significant that whereas in all of the cases cited, supra, the *plaintiff* originally chose voluntarily to claim under State law, in this case the *defendant* railroad induced plaintiffs to believe that only state law was applicable.

It was the railroad which was responsible for instituting state rather than Federal proceedings. Here, the railroad induced plaintiffs' assent to compensation agreements at a time when plaintiffs were without the benefit of counsel, while they were still incapacitated and, in one case, while plaintiff was still in the hospital.

Under these circumstances, the defendant should not be heard to object to plaintiffs' failure to institute Federal proceedings rather than the State Workmen's Compensation proceedings, and to take refuge behind the Statute of Limitations instead of defending upon the merits.

Under the above cited authorities, it appears indisputable that if plaintiff had originally started proceedings in an ordinary state court of record, even though he might have initially relied exclusively upon state law, the tolling of the federal statutes of limitations could not be gainsaid. But, the learned Courts below questioned whether Workmen's Compensation proceedings may be regarded as "litigation," having the effect of tolling the statute. That view we earnestly submit is wholly erroneous.

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[4] It is noteworthy that under the Pennsylvania Workmen's Compensation Act "in cases of personal injury, all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have **agreed** upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition * * *. Where, however, **payments** of compensation have been made in any case, **said limitations shall not take effect until the expiration of one year from the time of the making of the most recent payment** prior to date of filing such petition." (Act 1915, June 2, P.L. 736, Art. III, Sec. 315 as amended; 77 P.S. 602) (emphasis supplied). In other words, the Act provides that **either** an agreement **or** payments will toll the statute; and in point of fact, in the instant cases, there were **both** agreements **and** payments within one year of each federal suit.

It is true that a number of Pennsylvania cases (of which VIRTUE v. J. LEE PLUMMER, INC., et al., 111 Pa. Super. Ct. 476 (1934), 170 A. 443 cited by the Court below, is typical) have used language to the effect that Workmen's Compensation proceedings are not "litigation." *But in every single instance where that language has been used, it has been employed for the sole and exclusive purpose of holding that the procedure under the Workmen's Compensation Act is liberal and not to be governed by strict, common law rules of procedure and pleading.* Thus, in the VIRTUE case, itself, the *only* question was whether the procedure used by the plaintiff was proper when he filed, instead of an "original claim petition," one which he described as "a petition for review." The Court held that the petition would be considered as an "original" claim despite the pleading irregularity. It was in dealing with that *sole* problem that the Court said (at page 478):

> "It has many times been pointed out by the Supreme Court and this Court that a proceeding under the Workmen's Compensation Act is not 'litigation,' and *that established rules and principles of common law practice are not to be rigorously applied*: Gairt v. Curry Coal Min. Co., 272 Pa. 494, 498, 116 A. 382; Manley v. Lycoming Motors Corp., 83 Pa. Superior Ct. 173; Ratto v. Penna. Coal Co., 102 Pa. Superior Ct. 242, 247, 156 A. 749. The *courts take a liberal attitude toward pleadings in a compensation case and may consider a petition to reinstate as a petition to modify,* etc.: Higgins v. Com. C. & C. Co., 106 Pa. Superior Ct. 1, 161 A. 745." (Emphasis ours.)

From the context of the statement, it is clear that the Court intended to say no more than that liberal rules of procedure and pleading, more liberal perhaps than similar rules in common law courts, prevailed in Workmen's Compensation cases. The language of the VIRTUE case has been often repeated by Pennsylvania Courts, but *without excep-*

tion for the same, limited purpose of holding that procedure and pleading rules are to be applied liberally in Workmen's Compensation cases.

Thus viewed, the language of the VIRTUE case has no bearing whatsoever upon the problem of the instant cases. Even as restricted to the limited procedural context in which it was used, that language was nothing but a figure of speech, wholly unnecessary to the decision. For, if the mere applicability of liberal procedural and pleading rules serves to convert "litigation" into some nondescript matter, no. "litigation," then *mutatis mutandis,* actions in the federal courts, which by virtue of the new rules of procedure, are liberal by contrast with former rules, have likewise lost their "litigious" character. Under the circumstances, to accord to the loose language of the VIRTUE case any bearing upon the issue presented in the instant cases is to indulge in word worship with total disregard of substance.

The truth of the matter, of course, is that Workmen's Compensation proceedings, however liberal in *form,* are plainly "litigation" in adjudicating a multitude of disputes and controversies, between employers and employees, which before the advent of Workmen's Compensation acts were tried in the common law courts. Will it be suggested that what has always been acknowledged, historically, traditionally and intrinsically, as "litigation" can suddenly lose its litigious quality merely because the machinery for deciding the dispute is altered and liberalized? If Workmen's Compensation cases are not "litigation," why then do the appellate courts of Pennsylvania review decisions of the Workmen's Compensation Board? Is it not significant that in many states compensation cases are still adjudicated directly by ordinary courts of record? See a list of such states in SHORTZ v. FARRELL, 327 Pa. 81 at 87, 183 A. 20 (1937). And was not defendant, itself, "litigating," when it filed a petition against Conrad to terminate his compensation?

Despite the language in the VIRTUE and like cases, the Pennsylvania Supreme Court has acknowledged, as any reasonable mind must, that "proceedings in Workmen's Compensation cases are essentially of a judicial character." RICH HILL COAL CO. v. BASHORE, 334 Pa. 449, 499, 7 A. 2d 302 (1939); SHORTZ v. FARRELL, 327 Pa. 81, 193 A. 20 (1937). The latter case recognized not only that participation in Workmen's Compensation cases on behalf of another constitutes practice of law, but also that "even in compensation cases, the material findings must have a basis of *legal proof* on which to rest"; that "all findings of fact shall be based only upon *competent evidence*"; that "examinations and cross-examinations of witnesses require a knowledge of relevancy and materiality"; that "the application of the Workmen's Compensation Act frequently involves delicate problems of law and fact"; and that these "judicial" proceedings "were they transferred to a court room and carried on before a judge * * * involve the same fundamental characteristics of the determination of property rights and obligations of parties as do other judicial proceedings": SHORTZ v. FARRELL, supra, pp. 85-87 (Emphasis, the Court's.)

Workmen's Compensation proceedings have other indicia of litigation. "From the beginning of the hearing before the referee, a judicial record is made upon which the ultimate rights of the parties depend": SHORTZ v. FARRELL, supra, p. 88. And here, as in common law actions, is present one of the most important features of "litigation," namely, a conclusive adjudication, under the doctrine of *res judicata*.[5] Thus the determinations of state Workmen's Compensation Boards are conclusive and must be recog-

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[5] FLOWERS v. LIGGETT & MYERS TOBACCO CO., 145 Pa. Super. 230, 20 A.2d 856 (1941), and cases cited therein, at page 246 (1941); STOHAN v. ROCKHILL COAL CO., 140 Super. 146, 14 A.2d 229 (1940); HUHA v. FRICK COKE CO. 149 Pa. Super. 108, 27 A.2d 739 (1942); LANDRETH v. WABASH R. CO., 153 F.2d 98, cert. den. 328 U.S. 855, 66 S. Ct. 1345 (1946); SEMBLE, BRETSKY v. LEHIGH VALLEY R.R. CO., 156 F. 2d 594 (1946).

nized in other states: MAGNOLIA PETROLEUM CO. v. HUNT, 320 U. S. 430 (1943).

Finally, Workmen's Compensation cases, like any other cause of action, may be barred by the statute of limitations,—in Pennsylvania after one year, unless a petition or compensation agreement is filed within that time.[6] Since Workmen's Compensation proceedings are "litigation" for the purpose of the statute of limitations, when they are not timely commenced, it seems strained and anomalous to regard the same proceedings as not being "litigation" when they *are* seasonably started. If an employee's right to recover for personal injuries can be saved or barred by the commencement or failure to commence Workmen's Compensation proceedings, it must be because such proceedings are "litigation" for the purpose of the statute of limitations.

By whatever name Workmen's Compensation proceedings may be designated, one fact is incontrovertible. They are essentially the *sole* means today of adjudicating such issues between employers and employees in Pennsylvania. By starting such proceedings, plaintiffs have done fully as much to toll the statute as the plaintiff did in N. Y. CENTRAL & HUDSON R. R. v. KINNEY, 260 U. S. 340, supra, where he sued in a state court upon an exclusively state right and then, over seven years later, for the first time invoked the Federal Employers' Liability Act.

Nor is it of moment that the Workmen's Compensation proceedings were started here by the execution of a compensation *agreement*. A suit is no less litigious and conclusive because of its amicable origin. Decrees, orders and judgments are often entered by courts upon stipulation or agreement of the parties. They are no less judicial because of the agreement. Judgments entered by confession or on

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[6] See 77 P.S. 602; RATTO v. PA. COAL CO., 102 Pa. Super. 242, 156 A. 749 (1931); COSTENZA v. GENERAL BAKING CO., 147 Pa. Super. 591, 24 A.2d 735 (1942); SWEENEY v. READING CO., 146 Pa. Super. 32, 21 A.2d 468 aff'd 344 Pa. 561, 26 A.2d 199 (1942).

warrant of attorney likewise have all the attributes of judgments entered after trial.[7]

The significant circumstance here is that, under Pennsylvania law, all agreements for compensation, in order to be valid, must be approved by the Workmen's Compensation Board.[8] Such an agreement, properly approved, is as binding on the parties as an award rendered after hearings.[9] Moreover, the act specifically provides (Sec. 315-77 P. S. 602):

> "In cases of personal injury all claims for compensation shall be forever barred, unless in one year after the accident, the parties shall have agreed upon the compensation payable under this article, or unless in one year after the accident, one of the parties shall have filed a petition. * * * *Where,* however, *payments* of compensation *have been made in any case, said limitations shall not take effect until the expiration of one year from the time of the making of the most recent payment.* * * *" (Emphasis ours.)

It is obvious that the Act clearly stipulates that *an agreement of compensation will toll the statute of limitations no less than a petition. Moreover, payments will in any case also toll the statute.* The act makes no distinction between agreements for compensation and petitions, so far as the statute of limitations is concerned. In the instant cases, *there were both approved agreements and payments made thereunder within less than one year of the present actions.*

It is respectfully submitted, therefore, that despite the language of the VIRTUE case, Workmen's Compensation proceedings, including approved agreements for compen-

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[7] See Restate., Judgments, Section 47, comment a.

[8] Act of 1915, June 2, P.L. 736, Sec. 409 as amended 1939, June 21, P.L. 520 (77 P.S. 733); CEASE v. THOMAS, 155 Pa. Super. 215, 38 A. 2d 547 (1944).

[9] Semble, KILGORE v. STATE WORKMEN'S INS. FUND, 127 Pa. Super. 213, 193 A. 234 (1937).

sation, *are* "litigation" for the purpose of tolling statutes of limitation, and that the principle of the KINNEY case and like decisions is applicable here. This conclusion appears especially appropriate in view of the fact that it was the defendant, not the plaintiffs, who chose the particular forum.

It was merely a fortuitous circumstance that the forum open to the plaintiff in the KINNEY case had jurisdiction over actions for employees' injuries under state law and under the Federal Employers' Liability Act alike. The original theory of his suit was the same as that of plaintiffs in these cases,—state law. Plaintiff in the KINNEY case did no more to toll the "Federal" statutes of limitations than plaintiffs here. So long as they relied on Pennsylvania law, petitioners had no choice but to initiate Workmen's Compensation proceedings, for in Pennsylvania original jurisdiction of state common law courts, over such controversies, has been fully divested, and the remedy under the Workmen's Compensation Act made exclusive.[10]

Here, as much as in the KINNEY case, therefore, it is appropriate to state that:

> "* * * When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist. * * *"

Respondents and the learned Court below suggest that since recovery of workmen's compensation is not dependent upon negligence, proceedings before the Workmen's Compensation Board do not point to the "specified conduct" or negligence upon which an action under the Federal Employers' Liability Act must rest. Accordingly, respondent

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[10] CAPETOLA v. BARCLAY WHITE CO., 139 F. 2d 556, affirming 48 F. Supp. 797, cert. den. 321 U.S., 799, 64 S. Ct. 939 (1944); VENEZIA v. PHILA. ELECTRIC CO. 317 Pa 557, 177 A. 25 (1935); MOFFETT v. HARVISON-WALKER REFRACTORIES CO., 339 Pa. 112 14 A.2d 111 (1940).

urged below that it "was never put upon notice that it was charged with negligent conduct, so that it might have had a reasonable opportunity to investigate the facts before more than three years had elapsed." Similarly, it was stressed below that TILLER v. ATLANTIC COASTLINE R. CO.[11] is distinguishable because defendant there had notice from the beginning of the "events leading up to" the death of plaintiff's decedent.

But defendant's claim of surprise cannot be real. For it is a notorious fact, of which the Court may well take judicial notice, that immediately upon the happening of an accident, trained railroad investigators and claim agents look thoroughly into every phase of the accident. Names and addresses of witnesses, statements, photographs, etc., are quickly garnered. Indeed, a Pennsylvania statute[12] specifically requires a report to be made, soon after every accident, to the Pennsylvania Department of Labor and Industry, setting forth, inter alia, the name, address, age, wage, and occupation of the injured party, the date, hour, place, *cause*, and character of the injuries, the probable duration of disability, etc. Similarly, an Act of Congress[13] requires every carrier to make monthly reports of all accidents, stating the "*nature and causes thereof*" and "*circumstances connected therewith.*"

It seems inconceivable, therefore, that when the Workmen's Compensation proceedings were started in these cases the defendant railroad could possibly have ignored the "specified conduct" which was the foundation of workmen's compensation proceedings or a Federal Employers' Liability action, alike. In any event, in view of petitioners' charge that the workmen's compensation agreements were fraudu-

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[11] 323 U.S. 574, 65 S. Ct. 421 (1945).

[12] Act of 1913, July 19, P.L. 843, Sec. 1; 1937, March 10, P.L. 56 Sec. 1; 43 P.S. 12.

[13] Act of May 6, 1910 c. 208, Sec. 1, 36 Stat. 350, 45 U.S.C.A. 38.

lently[14] induced, defendant's full knowledge of the "specified conduct" may well be presumed for the purpose of the motions to dismiss.

It is true that in the KINNEY case, the original suit, although based on State law, was started in a state court having jurisdiction also over Federal Employers' Liability cases. And it is also true that in HERB v. PITCAIRN,[15] in holding the statute of limitations inapplicable to an action transferrable to another State court having jurisdiction (although originally started in a State court having no jurisdiction), this Court carefully observed that no opinion was being expressed as to "whether the action would be barred if state law made new or supplemental process necessary." The question there reserved or left open, is raised here. Certainly, HERB v. PITCAIRN does not foreclose the present actions.

Should plaintiffs in these cases be penalized and put in a less favored position than the plaintiff in the KINNEY case merely because of the fortuitous circumstance, over which no plaintiff could have any control, that a different state forum was provided originally in the KINNEY case than in Pennsylvania? So far as conduct of the plaintiffs, themselves, is concerned, plaintiffs here have done as much to toll the statute as the plaintiff in the KINNEY case.

The right to recover under the Federal Employers' Liability Act derives from an Act of Congress. The fact that a State does or does not provide for transfer of proceedings from one of its courts to another should not be determinative of the existence of a right to recover under a Federal statute. Moreover, the rights of railroad employees under

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[14] While the pleadings used the words "either fraudulently or by a mutual mistake of fact", under Rule 8e of the Federal Rules, alternative pleading is permissible; if one of the alternatives would be sufficient if made independently, the pleading is not rendered insufficient because of the insufficiency of the other alternative.

[15] 325 U.S. 77, 65 S. Ct. 954 (1945).

the Federal Employers' Liability Act should be uniform[16] throughout the country, and should not depend upon the fortuitous circumstance that, initially, the proceedings were brought in one State rather than in another. In short, it is submitted that the principle of the KINNEY case should be available to every employee under the Federal Employers' Liability Act, irrespective of whether the original tribunal accidentally happens to have jurisdiction over both state and federal causes and may therefore permit amendment of the original complaint, or whether state law authorizes the transfer of proceedings from one tribunal to another, as in HERB v. PITCAIRN, or whether the technicality of new or supplemental process is necessary. It should suffice that proceedings *in any tribunal* were instituted, so long as defendant was apprised from the beginning of the general basis for plaintiff's demand.

It is respectfully urged, therefore, that the institution of workmen's compensation proceedings, in these cases constituted commencement of an action and tolled the statute of limitation.

II.

DISMISSAL OF THESE SUITS WOULD PERMIT DEFENDANT TO VIOLATE SECTION 5 OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

Section 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) provides that:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability

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[16] The Federal Employers' Liability Act "establishes a rule or regulation which is intended to operate uniformly in all the states . . .": N. Y. Central & H.R. Railroad Co. v. Tonsellito, 244 U.S. 360, 361 (1916); Erie Railroad Co. v. Winfield, 244 U.S. 170, 172 (1916);

created by this chapter, shall to that extent be void. * * *"

It is submitted that this provision debars defendant from entering into any agreement with plaintiff which would restrict plaintiff's rights, under the Federal Employers' Liability Act, including an agreement under which plaintiff might waive his right to sue until after the statutory period. It is noteworthy that, while defendant does not directly rely upon its compensation agreement with plaintiff, in point of fact, if defendant is sustained in its reliance upon the statute of limitation, it would thereby be permitted, indirectly, to circumvent the purpose and objective of this Section of the Federal Employers' Liability Act. For, it was only because of their induced reliance upon this agreement with defendant that plaintiffs were lulled into the belief that Federal law was inapplicable and unavailable.

The view of the learned Circuit Court, that the effect of Section 5, if applicable, would be simply to void the compensation agreements, but not to toll the statute of limitation renders Section 5 wholly nugatory. Claim agents of defendant railroads are thus encouraged to resort to fraudulent devices calculated to delay actions until the running of the statute of limitations.

Respondents and the Circuit Court opinion suggest that in 1941 at the time of these workmen's compensation agreements, there was great uncertainty as to whether these cases arose out of interstate commerce or were intra-state and governed by state law. Assuming, pro arguendo, the existence of such uncertainty, it did not warrant defendant's flat and unequivocal assurance to petitioners that state law was definitely their exclusive remedy. In any event the record shows an averment of fraud[17] in the pleadings, raising at least a jury issue as to its presence, and foreclosing, for the purpose of the motions to dismiss any argument or presumption of *innocent* misrepresentation by defendant.

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[17] See Footnote 14.

The U. S. Supreme Court has never held or even directly stated that the statute of limitations in *Federal Employers' Liability cases* cannot be tolled for fraud or concealment. Only a few dicta in lower Federal courts,[18] have so suggested, and in none of those was the effect of Section 5 upon the statute of limitations raised or considered. In none of the Federal Employers' Liability decisions of this Court, cited in the opinion of the Circuit Court, was there any claim of fraud involved. This Court has never before considered the question whether, under Section 5, fraud may toll the statute of limitation. All the other cases cited in the opinion below involved other statutes of limitation, not pertaining to Federal Employers' Liability cases, and not limited or qualified by any provisions corresponding to the said Section 5.

Congress, when it enacted Section 5, laid down a mandate to all Courts trying cases under the Federal Employers' Liability Act, to the effect that no employee shall, by any legal technicality or contractual device, be deprived of the rights provided by this Act. Petitioners respectfully contend that Section 6 (the Statute of Limitations) must be read together with Section 5. In other words, all defenses to actions under the Federal Employers' Liability Act, even if otherwise available, must be "screened" through this Section 5 in order to be sustained, and Section 6, fixing a statute of limitations, even if it were otherwise applicable, must be read in the light of Section 5.

In principle, the present cases are not unlike DUNCAN v. THOMPSON, 315 U. S. 1 (1942). There, a railroad employee was injured, and the railroad obtained the employee's signature to a contract under which he agreed to negotiate and to attempt to settle the claim. For this he was paid $600.00. The contract provided that the employee, in order to bring suit, had to repay the $600.00. He sued, notwithstanding this provision and his failure to repay the money. The Court held the agreement void under

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[18] See Bell vs. Wabash Ry. Co., 58 F. 2d 569, 572 (C.C.A. 8, 1932).

Section 5 of the Act, since, if valid, it would have exempted the railroad from liability.

In SHERMAN v. PERE MARQUETTE RY. CO., 62 F. Supp. 590 (1945), Section 5 was held to invalidate an agreement, between the defendant railroad and its injured employee, under which the latter had agreed not to sue the railroad anywhere but in the state where the injuries occurred. Similarly, in ERIE R. CO. v. MARGUE, 23 F. 2d 664 (1928), defendant railroad was held barred by Section 5 from evading liability under the Federal Employers' Liability Act by delegating its responsibilities to independent contractors who would be liable to workmen only under state laws.

CONCLUSION.

It is respectfully urged that defendant should not be permitted to avail itself of the defense of the statute of limitations, first, because, under the cases, the proceedings before the State Workmen's Compensation Board, especially since prompted by the defendant itself, should be regarded as the commencement of an action, tolling the statute of limitations and, second, because allowance of the defense of statute of limitations would enable defendant to defeat and nullify the purpose of Section 5 of the Act.

Respectfully submitted,

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